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2019 COMPLIANCE NEWSLETTER

IN THIS EDITION:

Massachusetts Creditable Coverage

What You Don't Know Can Hurt Your Employees

In addition to completing federal personal income tax returns and indicating whether or not they maintained minimum essential coverage for 2018,[1] Massachusetts taxpayers must also indicate whether or not they maintained Massachusetts Creditable Coverage ("MCC") as required by the Massachusetts Health Care Reform Law when completing their Massachusetts personal income tax returns using Schedule HC. Massachusetts taxpayers who do not maintain MCC for themselves and their dependents throughout the year and who do not qualify for an exception are subject to state income tax penalties. MCC is the minimum level of health coverage that an individual must maintain in order to avoid a state tax penalty.

Basic MCC Requirements

- Coverage for a comprehensive set of services (e.g. doctor visits, hospital admissions, day surgery, emergency services, mental health and substance abuse, and prescription drug coverage);
- Doctor visits for preventive care, without a deductible;
- Caps on annual in-network deductibles of **$2,000** for an individual and **$4,000** for a family;
- For plans with up-front deductibles or co-insurance on core services, an annual maximum on out-of-pocket spending of no more than the annual limit set by the IRS for high deductible health plans (for **2019**, these are **$6,750** for an individual and **$13,500** for a family);
- No caps on total benefits for a particular illness or for a single year;
- No policy that covers only a fixed dollar amount per day or stay in the hospital, with the patient responsible for all other charges; and
- For policies with a separate prescription drug deductible, it cannot exceed **$250** for an individual or **$500** for a family.

1. The Affordable Care Act's individual mandate penalty for failing to maintain minimum essential coverage has been set to $0 beginning in 2019, but the penalty was still in effect for 2018. It is not yet clear if taxpayers will still be required to indicate whether or not they maintained minimum essential coverage for 2019 and beyond.

Some Alternative Solutions

Many common medical plan designs will not meet the Basic MCC Requirements described above, usually because the in-network deductibles are too high. The MCC rules provide some alternative solutions for a plan to qualify as MCC, but it's not unusual for employers to be unaware of this because the alternatives have not been communicated to them.

- ***High Deductible Health Plans (HDHPs)*** – A federally qualified HDHP is automatically deemed MCC, provided the HDHP is offered in conjunction with employer-facilitated health savings accounts or a health reimbursement arrangement (HRA).
- ***HRA Buy-Down*** – If the medical plan is offered in conjunction with an HRA, the employer's HRA contribution can be used to buy down the medical plan's in-network deductibles to a level deemed to meet the Basic MCC Requirement deductible caps of $2,000 for an individual and $4,000 for a family.

Example: A medical plan's in-network deductibles are $2,500 for an individual and $5,000 for all other tiers of coverage. The employer makes an HRA contribution of $500 for employees who enroll in employee-only coverage and $1,000 for employees who enroll in any other tier of coverage. For MCC purposes, the medical plan is treated as having an in-network deductible of $2,000/individual ($2,500 - $500) and $4,000/family ($5,000 - $1,000).

- ***Actuarial Equivalence*** – An employer may file an MCC Certification Application attesting the plan is actuarially equivalent to a Bronze level plan available through the Massachusetts Health Connector (Massachusetts' health insurance marketplace). If approved by the Health Connector, the medical plan will be deemed MCC for that plan year and for subsequent plan years so long as there are no material plan design changes and the MCC requirements do not change. The MCC Certification Application must be filed by or before November 1st of the year for which actuarial equivalence is claimed.

Note: Insurance carriers/TPAs will generally require the employer to pursue and confirm that one of these alternative solutions applies on behalf of the plan.

MA Form 1099-HC and an Ugly Surprise

Medical plans covering Massachusetts residents are generally required to provide those individuals with MA Form 1099-HC by January 31st of the following year indicating whether there coverage was or was not MCC. This is the insurance carrier's responsibility for fully insured coverage and may be delegated to TPAs for self-insured coverage. A letter informing an employee that their employer medical coverage failed to satisfy the MCC requirements is usually a nasty shock. The employee's first call will likely be to their human resources department asking, "Why did I get this letter? Why do I have a penalty? What are you going to do about it?"

Unfortunately, some health insurance carriers/TPAs have a spotty record of warning employers in advance that one or more medical plan options do not meet the Basic MCC Requirements. If the first warning is the delivery of MA Form 1099-HCs indicating the prior year's coverage was not creditable, it may be too late to do anything about it.

The liability for non-creditable coverage falls on the employees, and the 2019 penalties will be provided at the end of this article. Assuming the employer didn't communicate at enrollment that one or more medical plan options were non-creditable and carried potential tax risk to employees who enrolled in them, it might feel some responsibility to engage in crisis management and make the affected employees whole. Assuming the coverage can't be deemed MCC through one or more alternative solutions, this might involve making the affected employees "whole" by providing additional taxable compensation to compensate for the penalty amount. Depending on the facts and circumstances, the employer might consider requesting some sort of offset from an insurance carrier/TPA.

MCC Requirements and Certain Life Events

Certain life events impact how and/or when the MCC requirements affect individuals:

- ***Moving in*** – New residents have until the first day of the third full month following the month in which they become a Massachusetts resident to get creditable coverage.
- ***Moving out*** – The mandate applies until the last day of the last full month in which an individual claims residency in Massachusetts.
- ***Growing up*** – Once an individual turns 18 years old, they have a three-month grace period before the mandate applies.
- ***Self-employed*** – Health care premiums are tax-deductible and reduce an individual's taxable income.
- ***Living abroad during the golden years*** – Retired Massachusetts residents living abroad with foreign health insurance coverage should complete the Schedule HC by applying for a Certificate of Exemption or requesting an appeal on the Schedule HC.
- ***Death and taxes*** - The mandate applies until the last day of the last full month in which the individual was living.

State Tax Penalties for Failing to Maintain MCC

Failure to maintain MCC directly impacts the employee, not the employer. The penalties scale based on income and are indexed annually.

2. Employer contributions do not count toward this limit.

3. Note: The rest of the wellness rules under the ADA and GINA remain intact, however.

MCC Penalties for 2019				
Individual Income Category*	>150-200% FPL	>200-250% FPL	>250-300% FPL	>300% FPL
Penalty	$22/month $264/year	$42/month $504/year	$63/month $756/year	$127/month $1,524/year

**Use the chart below to determine the applicable federal poverty level (FPL) based on family size.*

Schedule Reflects 2018 FPL Standards for 2019 Eligibility				
Family Size	150% FPL	200% FPL	250% FPL	300% FPL
1	$18,210	$24,280	$30,350	$36,420
2	$24,690	$32,920	$41,150	$49,380
3	$31,170	$41,560	$51,950	$62,340
4	$37,650	$50,200	$62,750	$75,300
5	$44,130	$58,840	$73,550	$88,260
6	$50,610	$67,480	$84,350	$101,220
7	$57,090	$76,120	$95,150	$114,180
8	$63,570	$84,760	$105,950	$127,140
Each additional person add:	$6,480	$8,640	$10,800	$12,960

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Leave Laws Continue to Multiply

And Employer Challenges Continue to Mount…

Employers have long grappled with balancing compliance concerns, benefit administration costs and attracting and retaining a workforce in competitive environments. As additional states pass legislation requiring paid leave or disability benefits, and discussion of federally mandated paid family leave continues, employers are now forced to also navigate inconsistencies in the regulations.

While the Family and Medical Leave Act (FMLA), state paid family, sick and disability leave mandates all have separate requirements, they usually overlap with each other and with employer benefits such as short- and long-term disability, paid time off (PTO), or other paid sick leave benefits. For example, an employee who takes leave to give birth to their child could be eligible for FMLA, paid family leave, and/or paid disability through a state-mandated program or an employer-provided disability plan.

Being Proactive

How does an employer ensure it is in compliance, minimize costs associated with these programs, and support employees as they experience planned and unplanned events such as birth of a child or a cancer diagnosis?

1. ***Define your goals and priorities.*** Depending on location, industry, type of employer, and employer philosophy, goals differ. Defining your organizations goals with regard to people strategy will provide a framework as you determine which benefits you want to offer versus those that are required. An employer driven entirely by compliance and avoiding risk may choose to provide only those leaves or benefits that are mandated. Another employer may be interested in providing a more rich benefit than is required in order to attract and retain top talent in jobs where competition for talent is greater. An employer with locations in multiple states with differing regulations may choose to outsource administration of their programs in order to streamline benefits, realize administrative efficiencies and reduce risk of inconsistent administration.
2. ***Understand the leave and benefit programs that are mandated federally and in each state that you operate.***

Federal	
FMLA	The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a 12 month period to care for themselves or a family member for specified reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Additional FMLA leave may be available related to military deployment or to care for an ill or injured military service member.
Other	There are currently no federal laws that require private employers to provide paid sick time or disability benefits for off the job injuries or illness, or to provide pay for family medical leave as outlined above. Executive Order 13706 does require certain federal contractors to provide employees with seven paid sick days annually.

State	
Family Medical Leave	Several states, including California, Connecticut, D.C., Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington and Wisconsin, have state Family Medical Leave laws that provide additional coverage that may allow additional time for leave, or expand the definition of covered employees. Four states (California, Rhode Island, New Jersey and New York) and Washington D.C. now require differing levels of paid family leave. The states of Washington and Massachusetts have enacted legislation with benefits beginning 1/1/2020 and 1/1/2021 respectively. Most of these state programs are funded through employee and/or employer payroll taxes.
Paid Disability Benefits	State mandated or voluntary employer provided disability benefits provide income replacement for employees who give birth to a child, become ill or injured off the job and are unable to work. These typically require an elimination period, or time between when the employee is first off work and when benefits are paid and a maximum benefit period of three to six months, though they can provide benefits for as long as one year. Employers who provide disability benefits voluntary to their employees can do as a contributory or non-contributory plan, on either a fully insured basis through a disability carrier or on a self-insured basis administered internally or through a third-party. Five states current have mandated state disability programs: California, Hawaii, New Jersey, New York and Rhode Island. Some of these programs are funded through employee and employer payroll deductions and administered through a state disability program, while others, such as Hawaii require that employers either purchase a short-term disability policy through an authorized insurance carrier or to self-insure the benefit. The eligibility, elimination periods and benefits payments vary in each state.
Paid Sick Leave Benefits	In addition to voluntary employer paid programs, many states, cities and counties have mandated that employers must provide paid time off from work that can be used for an employee's own health or safety issues and sometimes to care for an employee's immediate family member. Employees typically earn one hour of sick leave per a set number of hours worked, and are able to use the sick leave for short term, typically less than a week, or acute needs. The amount an employee can earn, and use at one time, and the purposes for which they can be used varies widely from one regulation to the next. For example, a small business in Washington D.C. that employs less than 24 employees is required to provide employees with 1 hour for every 87 hours worked, up to three days. While New Jersey now requires that employees, with a few exceptions such as per diem hospital health care workers, accrue one hour of paid sick time per 30 hours worked. The New Jersey law superseded all existing local paid sick laws when it went into effect last October.

3. ***Define your leave and disability benefit programs and ensure your employee handbook is reflecting of your policies.*** For employers operating at a single worksite, or in a single state, this can be easier. For employers operating in multiple states, establishing policies that comply with all applicable regulations can be more complex. An employer should determine if they will have different benefits for employees in different locations/states, or if they will provide a benefit to all employees that is as rich as or better than the most generous state regulation they are required to comply with. For example, if an employer has employees in New York and in Kentucky, they can provide the mandated New York Paid Family Leave and Paid Disability Benefit to just their New York employees, or they can expand those policies and provide something equal to their employees in Kentucky. Employers can elect to have a separate employee handbook for each state or location that reflects the regulations and benefits appropriate for that location, or they can create separate policies within the same handbook. Having a well -defined policy lets employees know what to expect and to which benefits they are entitled. It also provides written evidence that the employers policy complies with regulations.

4. ***Administer your leave programs in accordance with your policy, in a consistent, non-discriminatory manner.*** Having a well-defined policy that complies with the regulations is a good first step. The importance comes in having a well-defined process that ensures you are complying with your own policy and ultimately the regulations. Stating that you comply with FMLA will not protect an employer who only sometimes requests medical certifications and does not have a standard process for providing rights and responsibilities notices with the prescribed amount of time. Further, it is important that the policy is administered in a non-discriminatory manner. For example, the Equal Employment Opportunity Commission sued Estee Lauder in 2017 claiming their parental leave policies were discriminatory. The parental leave benefit provided new mothers six weeks of paid parental leave for child bonding while new fathers only received two weeks of paid leave. The suit was settled for $1.1 million dollars and Estee Lauder’s agreement to treat both men and women equally with regard to parental leave.

Final Thoughts

It is crucial that employers understand the rules and regulations impacting their leave and disability benefits, and that they proactively develop policies and processes that align with their overall people strategy and minimize compliance risk. Creating a quick reference chart by location and common leave events can be helpful for both employees and human resources staff administering the programs and understanding which situations apply for each level of benefit. You should also consider available resources through your carrier partners, as well as, through ThinkHR, to help keep you and your team up to date and compliant with state and local leave laws.

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